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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35504 - OCCIDENTAL CHEMICAL CORPORATION

UNION PACIFIC RAILROAD COMPANY—PETITION FOR DECLARATORY ORDER

Occidental Chemical Corporation (together with its affiliates, including Oxy Vinyls, LP, "OxyChem") hereby submits these comments in the captioned proceedings. OxyChem understands that UP seeks a declaration from the Board that a tariff indemnity provision, purporting to shift liability for third party claims to shippers, is a reasonable term of service under the relevant statutes. OxyChem believes that, if the tariff indemnity provision sought by UP were affirmed, the Board would create additional uncertainty of result in litigation, and frustrate reliable and safe delivery of critical TIH products, causing harm to the economy. Therefore, OxyChem urges the Board to declare the indemnity provision unreasonable.

UP, like all rail carriers subject to the Board's regulation, is currently subject to certain statutory duties. 49 U.S.C. Section 11101(a) requires UP to "provide the transportation or service on reasonable request" and 49 U.S.C. Section 10702(2) places an obligation on UP to "establish reasonable rules and practices on matters related to that transportation or service." Although the Board has discretion in determining what is "reasonable" under Sections 11101 and 10702, UP bears the burden of establishing the reasonableness of the indemnity provision, including that the requested declaration would reduce uncertainty.[1]

The Board should find the indemnity provision unreasonable because: (1) it places broad liability on TIH shippers for risks not in their control; (2) it conflicts with state and federal laws

[1] *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005), FD 35504, ID 41915 (Dec. 12, 2011).

regarding allocation of liability; and (3) it may erode the common carrier rights of shippers and harm industry and employment in the United States.

BACKGROUND

The following background summarizes key testimony in prior related hearings, and provides context for this indemnity hearing. UP alleges in its petition that the indemnity provisions at issue are "the product of an agreement that resolved a complaint that The Chlorine Institute ("TCI") and American Chemistry Council ("ACC") filed against UP in a Utah federal court in June 2009."[2] Although UP has portrayed the indemnity provision as a product of compromise, we expect that this portrayal will be disputed by TCI, ACC and other interested trade associations in their joint submission.

The Board has recognized the importance of TIH products. OxyChem is a leading producer and merchant marketer of chlorine, an essential building block chemical with a vast array of applications and an important part of the U.S. economy, and its co-product, caustic soda. Chlorine chemistry is essential to everyday life. The products of chlorine chemistry make possible clean water and safe foods, pharmaceuticals, medical equipment, construction materials, computers, electronics, automobiles, clothing, sports equipment, agriculture, and much more. For the majority of these applications, there are no reasonable substitutes for chlorine. In addition to the benefits derived from its applications, chlorine also benefits the economy. According to TCI, chlorine products and their derivatives contribute more than $46 billion to the U.S. economy each year.

The safest way to transport chlorine is by rail. According to TCI, of the 1.5 million chlorine tank shipments since 1965, there have been 11 breaches of a tank car, representing only

[2] UP Petition p. 3, FD 35504, ID 229403 (April 27, 2011).

0.00073% of all shipments.[3] This safety record demonstrates the reasonableness of transporting chlorine by rail. Indeed, the railroads concede that shipping by rail is the safest way to move chlorine.[4] Chlorine producers have also invested significant resources in enhancing safety. For example, chlorine producers have provided equipment and training to first responders throughout the United States and are currently researching enhancements to the next generation railcar.

Finally, the common carrier obligation of railroads has been a keystone of federal transportation policy for over a century.[5] As part of the common carrier obligation, Congress does not permit a railroad to refuse to transport a commodity based on its dangerous characteristics,[6] or because doing so would be inconvenient or unprofitable.[7] Through public statements, senior rail industry executives have made clear that they would refuse to transport TIH materials if Congress did not require them to do so under the common carrier obligation.[8]

ARGUMENT

I. UP's Justifications for Shifting Liability to TIH Shippers are not Supported by Any Evidence.

In its Petition UP alleges that it would face staggering liabilities in the unlikely event of an accident involving a TIH shipment. Although there is no dispute as to the hazardous nature of TIH materials, OxyChem disputes the assertion that a rail carrier faces financial ruin in the event of an accident involving TIH materials. TIH has been shipped by rail since the 19th century without a single incident resulting in "staggering," "catastrophic," or "lose the company" liability

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[3] Chlorine Institute Briefing Paper, http://www.chlorineinstitute.org/files/PDFs/CICKitBriefingPaper121709.pdf (Dec. 2009).
[4] *See e.g.* AAR Response pp. 1-2, EP 677_1, ID 222615 (June 13, 2008) (recognizing rail is safest mode of transportation for TIH).
[5] *See e.g. Missouri Pacific Railway Co. v. Larabee Flour Mills Co.*, 211 U.S. 612 (1909).
[6] *Akron, Canton & Youngstown R. Co. v. I. C. C.*, 611 F.2d 1162 (6th Cir. 1979).
[7] *GS Roofing Products Co. v. STB*, 143 F.3d 387, 391 (8th Cir. 1998).
[8] Oral Testimony by John M. Gibson, Norfolk Southern Corporation and James A. Hixon, Association of American Railroads made before Panel 1 in STB EP 677 (April 25, 2008).

for a railroad or chemical shipper. Such claims are simply not supported by any evidence that has been provided.

Likewise, state tort law would not impose liability on UP in instances where UP was not at fault. No court has held the transportation of TIH products to be an ultrahazardous activity that would subject a rail carrier to strict liability. History has proven the wisdom of this rationale as the National Transportation Safety Board has found maintenance or operational errors on the part of the railroads to have caused the three previous fatal tank car accidents involving TIH (in Minot, North Dakota; Macdona, Texas; and Graniteville, South Carolina).[9] Without negligence on part of the railroads involved in these incidents, no release of TIH would have occurred, and thus the railroad involved was in each case the only party in a position to avoid such incidents. As UP has alleged difficulty in obtaining insurance, the Board should allow for sufficient discovery into any allegations regarding insurance premiums to establish the extent, if any, to which such evidence exists. If the railroads do not produce sufficient evidence to prove these allegations, UP will be unable to meet its burden and the indemnity provision should be held to be unreasonable. (Regardless, if true, it is unclear how any shipper would be better able to obtain such insurance). Although railroads have argued otherwise, we believe that insurance is available.

II. Affirmation of the UP Indemnity Provision Would be Bad Public Policy Because it Shifts Liability to Shippers for Risks they Cannot Mitigate Due to Rail Control and Responsibility.

Item 50[c]1 of the UP indemnity provision at issue provides that the railroad will

[9] *See* NTSB Accident Reports NTSB/RAR-05/04 PB2005-916304 (Graniteville, South Carolina), available at http://www.ntsb.gov/doclib/reports/2005/RAR0504.pdf; NTSB/RAR-04/01 PB2004-916301 (Minot, North Dakota), available at http://www.ntsb.gov/doclib/reports/2004/RAR0401.pdf; and NTSB/RAR-06/03 PB2006-916303 (Macdona, Texas), available at http://www.ntsb.gov/doclib/reports/2006/RAR0603.pdf.

indemnify the shipper for "liabilities" "arising from railroad's sole negligence or fault." Thus, the railroad's obligation to indemnify the shipper is limited to only "liabilities" that the railroad has caused. On the other hand, the indemnity obligations placed on the shipper are vastly broader in scope. Item 50[c]2 provides that the shipper will indemnify the railroad for "any [emphasis furnished] and all liabilities except those caused by the sole or concurring negligence or fault of railroad." Such "liabilities" would include, but not be limited to, those caused by third parties, acts of God, and those imposed through strict liability.[10] Further, covered "liabilities" would not be limited to those caused by a TIH release.

Allowing UP to unilaterally impose broad indemnity provisions on shippers would remove an important safety incentive, and is perverse public policy. As between a shipper that has no control over its product once it is tendered to the railroad, and the railroad that exercises control over the locomotive and tracks, the railroad that can mitigate risks should be responsible.

III. The Tort Laws Allocating Fault and Liabilities are the Province of State Courts and Governments.

Current state laws reflect thoughtful decisions as to when carrier liability should be limited. For example, one of the defenses to strict liability provided under the Restatement of Torts is if defendant's "activity is carried on in pursuance of a public duty imposed upon the actor as a public officer or employee or as a common carrier."[11] The law concerning enforceability of indemnity provisions has also been well developed. In most jurisdictions, indemnity provisions, such as that which is at issue in this proceeding, are unenforceable as a matter of law in situations when there is unequal bargaining power and when the terms of the

[10] In its decision opening this proceeding, the Board correctly recognized that the indemnity provision at issue includes the obligation for shippers to indemnify UP "liabilities resulting from the negligence or fault of shippers themselves, the negligence or fault of third parties, or from acts of God."
[11] Restatement (Second) of Torts § 521 (1977).

provision are not freely negotiable.[12] Given that a shipper has no bargaining power with respect to a unilaterally published public tariff, the indemnity provision at issue may not be enforceable under applicable state law. Thus, a Board decision determining the proposed indemnity language to be reasonable would greatly increase uncertainty of result in litigation. For example, if a state or federal court were to refuse to enforce the UP indemnity provision, would the Board wish to hear all of the other railroads' indemnity collection actions?

IV. Other Adverse Implications of UP's Proposed Indemnity Provision.

In addition to the uncertainty that would arise regarding enforceability of the indemnity provision at issue, several other uncertainties would result from a decision by the Board holding the indemnity provision to be reasonable. Given that railroad liability insurance costs are already incorporated into shipping rates, shifting of "liabilities" without a reduction in rail rates would amount to double dipping by the railroads, a practice recently banned by the Board in the rate based fuel surcharge proceeding.[13]

The Board has knowledge of the relative bargaining power of railroads and TIH shippers and receivers. OxyChem consistently finds unequal bargaining power; the railroads can and do set the terms for dealing. If the UP tariff indemnity were affirmed by the Board, this unequal bargaining power would allow railroads to insist upon indemnification terms and insurance coverage requirements that are far beyond the ability of the shippers or receivers to resist. How much insurance would be reasonable under those circumstances? Would the Board become a regular arbiter of the level of insurance required to support tariff indemnities? Sustaining the UP

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[12] *See e.g. Moxley v. Pfundstein*, __F.Supp.2d__, 2011 WL 2728354 (N.D. Ohio 2011) (applying Ohio law); *Valhal Corp v. Sullivan Associates, Inc.*, 44 F.3d 195 (3rd Cir. 1995) (applying Pennsylvania law); *Del Raso v. U.S.*, 244 F.3d 567 (7th Cir. 2001) (applying North Carolina law); and *Kansas City Power & Light Co. v. United Telephone Co. of Kan.*, 458 F.2d 177 (10th Cir. 1972) (applying Kansas law);.

[13] Decision, EP 661, ID 37341 (Jan. 26, 2007).

indemnity provision would push even more TIH shippers to private contracts. This would also have the effect of displacing the Board's important rate-making authority, since that only applies to shipments made by tariff.

This is a slippery slope. If shippers were unable to obtain "adequate" insurance, railroads would circumvent the common carrier obligation by refusing to transport products for shippers. Giving railroads this power[14] would impact the competitive balance in the TIH (and related) chemical markets and cause employment losses.

CONCLUSION

There is no evidence or public policy to justify the sweeping indemnity tariff imposed unilaterally by UP. The Board should find that UP's indemnity provision is unreasonable and cannot be included in its public tariffs.

Respectfully submitted on behalf of OxyChem by:

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[14] The Class I railroads are presently defendants in a lawsuit brought against them for violating antitrust laws by agreeing to impose fuel surcharges on numerous shippers. *See Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869, Misc. No. 07-0489 (PLF/AK/JMF).

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2011, I served a copy of the foregoing Opening Comments of Occidental Chemical Corporation ("OxyChem") as well as a copy of the Notice of Intent to Participate previously filed by OxyChem with the Surface Transportation Board on December 15, 2011 via email to the following adressees:

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